

challenges. These may include reconceptualization of the “duty of care” (as suggested by Moshe Hirsch in another context);²⁰ heightened visibility of internal disagreements about the interpretation of drone visuals; a rigorous inter-agency review process, with the goal of offering alternative interpretations (similar to the idea of “red teams” in investigative journalism); training sessions that identify the concrete limits and blind spots of the technology (including relevant biases, such as automation bias); and a shift from individual to organizational accountability for technology-related failures.

This last point can lead to better compliance as it encourages individuals to identify their own errors without fear of retaliation. Of course, *ex post* investigations are themselves influenced by a number of cognitive biases, including outcome bias, as Tomer Broude and Inbar Levy demonstrate.²¹ In my contribution to Andrea Bianchi and Moshe Hirsch’s *International Law’s Invisible Frames* book, I propose legal, epistemological, and behavioral ways to strengthen *ex post* military investigations, with a particular emphasis on *ex post* fact-finding processes.²²

While drone visuals hold much promise for evidence driven risk assessments, visualization technologies may also jeopardize safety and security by masking data gaps and triggering unconscious cognitive biases. As governments around the world intensify their investments in sophisticated combat drones, it is essential to develop effective ways to better integrate these technologies into human decision-making processes, acknowledging the limitations of human cognition.

PROTECTING INDIVIDUAL RIGHTS TO COUNTERACT DEMOCRATIC BACKSLIDING: HUMAN RIGHTS LAW AS A PARTIAL RESPONSE TO AUTOCRATIC POPULISM

doi:10.1017/amp.2023.58

*By Julian Huertas**

I. INTRODUCTION

Democratic deterioration and the rise of authoritarian leaders and parties are some of the most critical issues in contemporary international, comparative, and constitutional law. Apart from Russia’s, China’s, or Iran’s “traditional” authoritarian regimes, populist and anti-liberal movements are hurting consolidated democracies (like the United States and the United Kingdom) and threatening the slow progress made in the last decades in transitional societies (Turkey, Hungary, or Poland). On the latter point, recent literature has studied how autocratic leaders come to power using formally legal and democratic means. They do not attempt coups d’état but win democratic elections. Their laws are not blatantly violated but amended through the established legislative process. Notably, they do not impose new authoritarian constitutions but reform or enact new ones following popular-backed constituent assemblies and similar mechanisms. However, the desired result is always the same: increasing the leader’s grip over the political

²⁰ Moshe Hirsch, *Cognitive Sociology, Social Cognition and Coping with Racial Discrimination in International Law*, 30 *EUR. J. INT’L L.* 1319 (2019).

²¹ Tomer Broude & Inbar Levy, *Outcome Bias and Expertise in Investigations Under International Humanitarian Law*, 30 *EUR. J. INT’L L.* 1303 (2019).

²² Krebs, *supra* note 19.

* Doctoral student (SJD candidate), University of Toronto Faculty of Law. Assistant professor (on leave), Universidad de La Sabana (Colombia). Contact: julian.huertas@mail.utoronto.ca; julian.huertas1@unisabana.edu.co.

system, weakening the rules, actors, and institutions that check him, and consolidating his power over time to the detriment of democratic pluralism.¹

Because of such relatively novel ways of exploiting legal frameworks, the democratic dismantling process is hard to notice at first, at least by large groups of voters who would otherwise reject the effects of those measures if known in advance. Constitutionalists and political scientists have used terms like *abusive constitutionalism* or *autocratic legalism* to describe this phenomenon.² Similarly, international legal scholars have examined the attitude of autocratic leaders toward international law and have suggested the emergence of *international authoritarian law* based on regional cooperation aimed at protecting the ruler's domestic position of power.³ But even without engaging in illiberal cooperation, authoritarians adopt similar positions in the international arena. They tend to embrace isolationist positions, rejecting "globalism" and the cosmopolitan elites that meddle in domestic affairs despite not having been legitimized by a democratic mandate.⁴

At both levels, domestic and international, national courts play a relevant role. In many cases, they try to resist the initial moves of the autocrat's chess. However, that institutional resistance typically falters when it is clear that the authoritarian project has garnered significant support to threaten the courts' authority. In countries where this has occurred, domestic courts are of little use to spot and block anti-democratic tactics either because they have been packed with loyal allies of the regime or because the populist leader has changed the constitution and legislation to disempower the judiciary. In those situations, the regime has succeeded in diminishing an important source of checks that could otherwise expose and impede further acts aimed at democratic erosion.

Due to this grim scenario, some authors have considered different mechanisms by which external institutions could identify not only evident disruptions of the constitutional order but also more subtle tactics directed at the same goal.⁵ However, those proposals would involve creating new multilateral institutions that would denounce and (try to) stop the transformations promoted by autocrats. Even so, that would require support from other countries (ratifying treaties, structuring, and funding new institutions) and still more unlikely, the consent of the authoritarian states concerned.

Nevertheless, the example of the Inter-American Court of Human Rights (IACtHR or Court) toward the Venezuelan democratic backsliding offers an alternative path that could help tackle some challenges of autocratic populism. In this presentation, I explore how, while the strategy of Hugo Chávez to dismantle the already imperfect Venezuelan democracy is best understood in terms of abusive constitutionalism and autocratic legalism, the IACtHR—assisted by the Inter-American Commission on Human Rights—responded with another strategy rooted in the idea that some individual human rights have a significant social and political role to play in contexts of democratic deterioration.

I call the Court's strategy *Pro-Democratic Structural Human Rights Adjudication*. The cases against Venezuela in which the Inter-American Court deployed that strategy were *Apitz Barbera*

¹ As recalled by Scheppele, the central autocratic, populist figures in recent history have only been male leaders. Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

² *Id.*; David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

³ Tom Ginsburg, *Authoritarian International Law?*, 114 AJIL 221 (2020); TOM GINSBURG, *DEMOCRACIES AND INTERNATIONAL LAW* (2021).

⁴ Ran Hirschl, *Opting Out of "Global Constitutionalism,"* 12 L. & ETHICS HUM. RTS. 1, 8–12 (2018).

⁵ These include stronger and more fine-tuned enforcement of constitutional clauses, mainly by international actors. Vicki Jackson and Rosalind Dixon have questioned this idea as a form of "extra-territorial constitutional interpretation." Rosalind Dixon & Vicki C. Jackson, *Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests*, 48 WAKE FOREST L. REV. 149, 154–56 (2013). Moreover, some have even proposed the creation of a global constitutional court. Landau, *supra* note 2, at 255.

et al. (2008), *López Mendoza* (2011), and *Radio Caracas Television (RCTV)* (2015). The effort to frustrate or at least mitigate Chávez's assault on democracy was grounded on the intimate association between *some* civil and political human rights and democracy. Even when the Court was nominally addressing human rights abuses on concrete victims, it also took a structural approach that allowed it to challenge more general problems. In that way, the Court not only adjudicated individual human rights violations but also denounced the policies behind those state actions. Additionally, it designed rulings aimed at protecting both the victims and other individuals not directly involved in the controversy and required the state to remove or change policies that had a negative effect on democracy overall.

In this presentation, I will focus mostly on the first tenet of the Courts' *pro-democratic structural adjudication*. That is, I will examine the cases decided by the Inter-American Court and how it interpreted the government conduct that caused concrete violations of rights, the policies behind those actions, and the human rights as enshrined in the American Convention. Before that (Part II), I will summarize the facts of the three cases examined in this presentation. A brief comment on the remedies and their rejection by the Venezuelan executive and judiciary will conclude my intervention.

II. THREE CASES AGAINST VENEZUELA'S AUTHORITARIAN REVOLUTION

The first of those cases, *Apitz Barbera et al. v. Venezuela* (2008), relates to the removal of three provisional judges from the First Court of Administrative Disputes. The 1999 Venezuelan constituent assembly had created the Commission for Operating and Restructuring the Judicial System (CORJS), an administrative, disciplinary body with jurisdiction over most Venezuelan judges. The new 1999 Constitution provided that the disciplinary system for the Venezuelan judiciary shall be regulated by the Code of Ethics, a statute that the National Assembly had to promulgate.⁶ In October 2003, the CORJS removed from office three provisional judges critical of the administration and justified its decision on the fact that the judges had committed "an inexcusable judicial error" when they granted *amparo* (a judicial writ intended to protect constitutional rights) against an administrative act that denied a request for protocolization of a land sale.⁷

In *López Mendoza v. Venezuela*, the comptroller general—an administrative body charged with investigating and punishing corruption, misuse of state assets, and acts against public morals—disqualified Leopoldo López, one of the most prominent members of the opposition, from holding public office for six years. The disqualification of López was based on two corruption-related investigations regarding his job at *Petróleos de Venezuela* [Venezuela Petroleum – PDVSA] and some of his decisions when he was mayor of Chacao, an administrative subdivision of Caracas, Venezuela's capital.

Finally, *RCTV v. Venezuela*—delivered in 2015, two years after Chávez died and Nicolás Maduro became president—was related to *Radio Caracas Televisión* (RCTV), one of the television stations critical of President Chávez. Its broadcast license, which was granted in 1940 and renewed for twenty years in 1987, was not renewed in 2007 by the government telecommunications agency (*Comisión Nacional de Telecomunicaciones* (CONATEL)). Besides terminating its concession, and after a favorable ruling handed down by Venezuela's Supreme Tribunal of Justice, the government seized the company's equipment and established another TV channel that used the frequency previously used by RCTV.

⁶ Constitution of Venezuela, Art. 267.

⁷ The CORJS applied Article 40, part 4, of the Venezuelan Judiciary Career Act, which provides that "judges shall be removed from office . . . [w]hen they have incurred in grave inexcusable judicial error." See *Apitz Barbera et al. ("First Administrative Court") v. Venezuela*, para. 192 (IACtHR Aug. 5, 2008).

III. SPOTTING AND DENOUNCING DEMOCRATIC BACKSLIDING THROUGH HUMAN RIGHTS ADJUDICATION

Pro-democratic structural adjudication, as executed by the Inter-American Court, consisted of two components. The first refers to a distinctive way of interpreting the government actions that caused the violations and the individual rights at stake. The Court framed the human rights violations as elements of a broader governmental scheme conducive to eroding democracy. It did not stop at the specific official conduct that gave rise to the cases brought to the Inter-American System—which in any event would have been consistent with the typically deferential and passive style of international tribunals. Instead, the IACtHR looked into the political and institutional causes of concrete state behavior. That position required interpreting the rights of the particular victims in an expansive way. Yet, since according to the Court, Latin American states' understandings of human rights do not offer a reliable basis to construe the American Convention on Human Rights (ACHR), the IACtHR resorted to European human rights law and other international legal instruments to interpret the American Convention.

This idiosyncratic way of interpreting the American Convention was reflected in the three cases against Venezuela. In *Apitz Barbera*, judicial independence was at the core of the controversy. The Inter-American Court interpreted the right to a fair trial of the three provisional judges removed from the bench by an administrative disciplinary body. The IACtHR cited General Comment No. 32, Article 14, issued by the UN Human Rights Committee, which asserted that when the executive dismisses judges, it has to express the reasons for that decision and make available the possibility of contesting the dismissal. The Court also cited the UN Basic Principles on the Independence of the Judiciary (UN Basic Principles)⁸ and even a Recommendation by the Council of Europe.⁹

The IACtHR stressed that “the rules on the promotion, transfer, distribution of cases, suspension, and removal from office of judges having a permanent tenure must apply fully to those judges lacking such tenure.”¹⁰ This reasoning relied, again, on the UN Basic Principles, as well as Guideline II of the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence.¹¹ The sources cited helped the IACtHR conclude that, in a removal procedure, provisional judges have to a large extent the same rights and protections as tenured judges.

In *López Mendoza v. Venezuela*, the Court structured its ruling according to the right to participate in government (ACHR Art. 23) and the obligation to undertake legal measures to make the Convention effective in the domestic order. Since the former was directly linked to the latter, the IACtHR focused on the rights of the opposition in a democratic system. The comptroller had justified its sanctions against López under the Organic Law of the Comptroller General (Organic Law).¹² The Court considered that the Organic Law did not conform to the right to a fair trial (Article 8) and, specifically, to the duty of ensuring “legal certainty” to the individuals subjected to it. The Court considered that the five-year period that the comptroller

⁸ The Court cited Article 12 of the Basic Principles, which reads: “Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”

⁹ The IACtHR cited Principle I.3 of *Recommendation No. R (94) 12*, adopted by Council of Europe Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges.

¹⁰ *Apitz Barbera et al. (“First Administrative Court”) v. Venezuela*, *supra* note 7, para. 45.

¹¹ The Latimer House Guidelines can be found here: <https://thecommonwealth.org/sites/default/files/news-items/documents/LatimerHousePrinciplesPH7Jul17.pdf>.

¹² According to the Office of the Comptroller, López violated, among other provisions, Articles 113.7 and 113.5 of the Organic Law of the Comptroller General of the Republic and the National System of Fiscal Oversight.

had to impose sanctions once an individual was declared responsible did not comply with the requirements of certainty and foreseeability.

To support that conclusion, the IACtHR constructed ACHR Article 8 and the standards of certainty and foreseeability based on the case law of the European Court of Human Rights (ECtHR).¹³ That requirement (foreseeability) was likewise presented under the ECtHR's understanding of what it means for a law to be foreseeable.¹⁴ The Court concluded that five years was not a reasonable term to ensure the foreseeability of the sanction insofar as it constituted a too-prolonged time between the responsibility being declared and the sanction being decided.

Lastly, freedom of expression was the central issue in *RCTV v. Venezuela*. The Inter-American Court focused on the individuals (executives and other employees) who worked and communicated their ideas through RCTV and found that the license non-renewal violated their freedom of expression. During the hearings at the Inter-American Court, the representatives of RCTV's workers invoked the existence of a legal right to the renewal of broadcast licenses after they have expired, but they could not support it on either domestic legislation or international norms. The IACtHR pointed out that "regarding whether a right to the renewal of broadcasting frequency concessions may be deduced from comparative law, the Court has no evidence and no arguments were presented that could support this assertion."¹⁵

This type of reasoning, perhaps more than other instances of the use of external law, suggests that for the Court, international law is not only helpful but normatively constitutive in interpreting the American Convention. Although the prevalence of that alleged right was not found in comparative law, the IACtHR asserted an interpretive principle that accentuated the preeminence of external law—rather than Latin American states' consent—in construing the American Convention on Human Rights. On the other hand, when it focused on the administrative procedures regulated by the Telecommunications Law, the IACtHR found that CONATEL decided not to apply the rules on broadcast licenses. The reason for that was RCTV's political orientation, which was radically opposed to the government ideology. That abuse of power attempted to "align" the station's editorial line with the government's policies. Moreover, the Venezuelan population ended up being deprived of different opinions and a pluralist democratic debate.¹⁶ Consequently, the Court concluded, the government discriminated against RCTV based on its political orientation and, in doing so, violated its workers' right to freedom of expression.

IV. PRO-DEMOCRATIC STRUCTURAL REMEDIES

In the three judgments analyzed, the Inter-American Court granted individual remedies to the direct victims of the abuses committed by the state. However, the Court used its remedial jurisdiction not only to grant relief to the victims in every case decided but also to demand from the state the reform of the policy underlying each concrete breach of the American Convention. This component of *pro-democratic structural adjudication* involved some policymaking by the Court for

¹³ The Inter-American Court cited five cases of the European Court in support of those requirements: for the "adequately accessible" requirement, it cited *Hasan and Chaush v. Bulgaria* (2000) and *Malone v. The United Kingdom* (1984). For "sufficient precision," it cited *Maestri v. Italy* (2004), *Malone v. The United Kingdom*, and *Silver and Others v. The United Kingdom* (1983). And for the third requirement (the law must be "foreseeable"), the Court cited *Landvreugd v. The Netherlands* (2002). *López Mendoza v. Venezuela*, Merits, Reparations, and Costs, para. 199 (IACtHR, Sept. 1, 2011).

¹⁴ The Court cited ECtHR's *Landvreugd v. The Netherlands*, Judgment of 4 June 2002 para. 59. *López Mendoza v. Venezuela*, *supra* note 13, para. 199.

¹⁵ Granier et al. (Radio Caracas Television) v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, para. 179 (IACtHR June 22, 2015).

¹⁶ *Id.*, paras. 197–99.

the sake of preventing similar human rights violations in the future and, more significantly, of counteracting the attack on Venezuela's democracy.

Firstly, in *Apitz Barbera*, the Court emphasized the lack of independence of the CORJS when it decided against the three judges and challenged the status of provisional judges under the jurisdiction of the CORJS. The systemic remedial measures consisted of passing the Code of Judicial Ethics, which would mean ending the transitory regime that allowed the CORJS to review the conduct of provisional judges.

Secondly, in *López Mendoza*, the Court ordered Venezuela to amend the Organic Law so as to make it compatible with the American Convention. The purpose here was to protect other opposition leaders from attacks orchestrated under an administrative body like the comptroller.

Thirdly, in *RCTV*, the Court took a less ambitious approach to remedies, at least as far as structural reform is concerned (it ordered restoring RCTV's license and keeping it operative until the state assigned the frequency in a new transparent process). However, it is plausible to argue that this set of reparations may have had (if enforced) a wider impact than it appears at first sight. The key to understanding this IACtHR ruling is not so much the individual rights of RCTV and its workers but the appalling prospects for public debate and political life in a society without a plurality of opinions. In a real way, the individual remedies in favor of RCTV (apart from monetary compensation) also entailed a different kind of relief for the Venezuelan society as a whole. In that sense, those remedies were "structural."

Having said that, the IACtHR, like many international and domestic courts, does not have enforcement jurisdiction, which means that it is up to the state to comply with or reject the enforcement of the rulings. Not surprisingly, Venezuela followed the second road. Nevertheless, the failure to implement the remedies only reflects the inherent limits of law and courts in general. My first argument in this presentation has been that, through the interpretation of human rights law, the *pro-democratic structural adjudication* path developed by the Court served to detect and expose the legalistic tactics of the authoritarian government at a time when domestic institutions were not willing or able to do so. The second argument was that, although the state did not enforce the structural remedies to redress the consequences of its conduct, the IACtHR created new legal obligations for the state. And those unmet obligations (the fact that they were not implemented) delegitimized the government and could have empowered domestic actors in their fight against autocracy.

To conclude, the use of individual human rights to prevent the success of autocratic populism cannot be seen as a panacea but only as one approach which needs to be accompanied by equivalent efforts from other fields. The advantages offered by pro-democratic structural adjudication relate both to the identification (and exposure) of subtle maneuvers to gradually undermine democratic safeguards and the creation of legal obligations born due to human rights abuses. But if recent history suggests any lesson, it is that autocrats do not bend to legal demands easily. That does not mean that legal strategies are irrelevant, but that their (de)legitimizing effect on governments needs to be complemented by other political and diplomatic forms of pressure.